(3)

No. 90-1011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THOMAS EDWARD NEVIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Petitioner was tried and convicted in the District of Oregon of various offenses arising out of his relationship as a borrower from State Federal Savings and Loan ("State Federal"), a Corvallis, Oregon, savings and loan institution. Petitioner's conviction was in large

part based on the testimony of three alleged co-conspirators (Franks, Koos, and Campbell) who pled guilty to some of the very crimes with which Petitioner was charged.

The numerous advantages to these witnesses of pleading guilty and cooperating are described in the Petition at 4-5 and in the government's Brief at 3. The degree of understanding (or misunderstanding) Messrs. Franks and Koos possessed as to the charges to which they pled guilty is addressed in the Petition at 6-8 and in the government's Brief at 3-4.

Petitioner sought to show through cross-examination and to argue in closing argument that, in fact, these witnesses were not actually guilty of the crimes to which they pled guilty.

Petitioner sought to demonstrate that these witnesses pled guilty out of a mistaken understanding of how the law applied to their conduct or out of an overwhelming desire to obtain the advantages of a plea agreement.

The trial court at first permitted such cross-examination but then abruptly prohibited these inquiries at a crucial point in recross-examination by stating in the presence of the jury that Mr. Franks' plea was a "valid plea, and that's the end of that." TR 655. This suggested, of course, that Mr. Franks was in fact guilty of the charge to which he pled guilty. The district court subsequently compounded the harm by prohibiting defense counsel from any closing argument that would suggest that

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Mr. Franks "was not guilty when he entered the plea." TR 675.

ARGUMENT

1. The district court's ruling was affirmed by the Court of Appeals on the theory that Petitioner intended to pursue a purely "legal issue." The government now echoes that view, characterizing the "Question Presented" as whether Petitioner may challenge the "legal sufficiency" of another person's guilty plea. The question of the legal sufficiency of the guilty pleas is beside the point. Rule 11, Fed. R. Crim. P., governs the acceptance of guilty pleas by a district judge. The "legal sufficiency" of Mr. Franks' guilty plea depends on whether Rule 11 was observed when he pled guilty. See McCarthy v. United States, 394 U.S. 459,

89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Petitioner had no interest in questioning the legal sufficiency of guilty pleas. Petitioner's interest was in showing that his alleged accomplices were not guilty of the offenses to which they pled guilty. One cannot necessarily interpret a legally sufficient guilty plea as meaning that the individual in fact committed the crime. A person may enter a valid and otherwise legally sufficient guilty plea while continuing to maintain his innocence. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

2. The "legal sufficiency" tack adopted by the government also enables it to declare the subject of guilty pleas off limits as the exclusive

province of the judge--with no relevance to the jury's function. There is no question that a district court's own judgment about the legal sufficiency of a proffered guilty plea is at that time a legal issue. However, a guilty plea does not foreclose subsequent examination by a co-defendant of the factual basis of the plea. Indeed, the Fifth Circuit has held that a judge's determination made in accepting a guilty plea "does not have collateral estoppel effect" in a subsequent criminal proceeding. United States v. Mayer, 556 F.2d 245, 251 (5th Cir. 1977).

The government erroneously suggests that Mayer, supra, and United States v. Marion, 477 F.2d 330 (6th Cir. 1973), bear no resemblance to this case. The fact is that in those cases (as well

as in this case) the trial court prohibited inquiry into the circumstances of guilty pleas of government witnesses because the same judge had accepted the guilty pleas and formed his own judgments about the pleas. Those judgments were imposed on the jury as a substitute for cross-examination. In Mayer and Marion, however, the trial court was reversed for having improperly limited cross-examination; whereas in this case the trial court's ruling was affirmed on the grounds that guilty pleas are a legal issue beyond the realm of the trial jury. That is a square conflict.

This Court has recognized that an issue that is legal in one context may be factual in another and that a trial jury may therefore have occasion

to revisit a judge's legal findings for a different purpose. In Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), this Court held that the circumstances surrounding the taking of a confession could be explored during a trial as bearing on the credibility of the confession, notwithstanding a previous legal finding by the court that the confession was voluntarily given. "[T]he circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual." 476 U.S. at 688, 106 S.Ct. at 2145. The same is certainly true of the circumstances surrounding the taking of a guilty plea. The mere fact that a guilty plea at one time has a legal aspect does not strip it of factual

relevance in a later proceeding. We respectfully submit that the Court of Appeals below overlooked this important principle expressed in Crane v. Kentucky when it decided Petitioner's case.

3. By its citation to Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988), a case inapposite here, the government suggests that these guilty pleas were irrelevant to the question of Petitioner's guilt. Br.Resp. at 7. We point out that the government did not take that approach at trial.

At the trial, the government put these three guilty pleas into evidence during the direct examination of each of its respective witnesses. The government used Petitioner's association with the accomplices/ witnesses to tie him to the scheme and

conspiracy shown by those guilty pleas. The Court need only look to the closing argument of government counsel to assess the impact of this tactic. "And if Mr. Franks [the primary government witness] is a crook, well, you lay down with dogs, and you get fleas, ladies and gentlemen." RT 2019.

No one can seriously doubt the benefit to the government and attendant damage to Petitioner of the fact that guilty pleas of accomplices were in evidence. Petitioner sought to explore in cross-examination, and argue in closing argument if supported by the evidence, that these witnesses simply were not guilty of the offenses to which they pled guilty. The trial court improperly took this question from the jury.

4. If in pleading guilty one is to admit all the elements of a formal charge, he must possess "an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969) (footnote omitted). The record establishes quite persuasively that Mr. Franks possessed little if any understanding of the law in relation to the facts when he pled guilty. Mr. Koos, on the other hand, pled guilty after "balancing the risk involved in going ahead with the case." RT 264.

This Court has observed that "[R]easons other than the fact that he is guilty may induce a defendant to so plead. . . ." North Carolina v. Alford, supra, 400 U.S. at 33, 91 S.Ct. at 165,

quoting, State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879). This candid assessment was never more apt than in this case, and yet neither the government nor the two courts below have articulated a reason why Petitioner could not simply suggest as much to the jury.

5. The possibility that the factual basis required of a guilty plea can be "smoothed over" or even misrepresented by an individual anxious to plead guilty is greatest in complex prosecutions, as here, involving confusing banking regulations such as the loan-to-one-borrower rule. The government's eagerness to obtain a plea agreement to strengthen its case and a district court's willingness to accept a guilty plea under these circumstances

must be subject to scrutiny by a criminal defendant against whom that guilty plea is used. Therein lies the importance of this question to the administration of criminal justice.

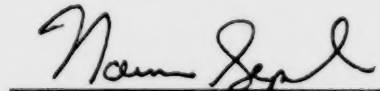
CONCLUSION

For the reasons stated, the Writ should be granted and the Judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED this 12th day of April, 1991.

Respectfully submitted,

NORMAN SEPENUK, P.C.



Norman Sepenuk
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Kenneth W. Starr
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

Lance A. Caldwell
Assistant U. S. Attorney
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and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this 15th day of April, 1991.

Norman Sepenuk
Of Attorneys for Petitioner